STATE OF MICHIGAN

COURT OF APPEALS

In re RACHELLE LAVERTY, a Minor.

UNPUBLISHED
May 27, 1997

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

No. 192847
Mackinac Probate Court
LC No. 95-000974 NA

KENNETH LAVERTY,

Respondent-Appellant.

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Respondent appeals by leave granted from an order placing his daughter, Rachelle Laverty, d/o/b March 7, 1986, in the temporary custody of the probate court. This order followed a jury trial in which a verdict was returned, finding that the probate court had jurisdiction over Rachelle. The finding of jurisdiction stemmed from Rachelle's allegations that respondent had sexually abused her. We affirm.

Respondent first argues that the trial court abused its discretion, *City of Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995), by denying his motion for a continuance. However, respondent has not provided any specific indication of how he may have been prejudiced by the denial of a continuance. While respondent asserts that child protective proceedings are quasi-criminal in nature, even in an actual criminal case, this Court has declined to reverse based on a denial of a continuance where the defendants did not show prejudice. *Id.* at 351. Accordingly, respondent has not established error requiring reversal based on this issue.

Respondent also raises several claims of improper remarks by petitioner's counsel, who was a prosecutor, which he frames as issues of prosecutorial misconduct. The bulk of these claims were not preserved below. Assuming for purposes of discussion that case law regarding prosecutorial misconduct in a criminal case is applicable to the proceeding at issue, respondent has still not established error requiring reversal. With regard to the remarks that were not challenged below, appellate review is

generally precluded, but an exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). With regard to the claims of improper remarks that were preserved by objection below, we review prosecutorial remarks in context to determine if a defendant was denied a fair and impartial trial. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

To address each of respondent's allegations of misconduct in turn, respondent first argues that the prosecutor inappropriately commented on the quality and credibility of witnesses. However, a prosecutor may comment on the credibility of a prosecution witness during closing argument. *People v Stacy*, 193 Mich App 19, 29-30, 37; 484 NW2d 675 (1992). In light of Dr. Loretta Leja's record of pertinent academic and professional experience, the prosecutor reasonably argued based on the evidence that she had superior credentials. *McElhaney, supra* at 284. Likewise, the prosecutor reasonably argued that Mary Ann Tuschak had excellent credentials in light of her academic background and practical experience. *Id.*

The prosecutor also attacked Misti Laverty's credibility by noting that four other witnesses had testified that she had made pretrial statements about when Rachelle had first told her about being sexually abused that were inconsistent with her trial testimony. With regard to three of these witnesses, this was proper argument attacking Ms. Laverty's credibility based on evidence that she made inconsistent statements. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, with regard to one of the four witnesses referenced by the prosecutor, Dr. Leja, the argument was not supported by any evidence. Indeed, Dr. Leja indicated that she had not received a history from Rachelle's parents. However, this comment was not challenged below. Inasmuch as the prosecutor correctly noted, based on the testimony of three witnesses, that Ms. Laverty made these prior statements that contradicted her trial testimony, he made the basic point that multiple witnesses contradicted her. Accordingly, the reference to Dr. Leja did not constitute manifest injustice because it added very little to the degree that Ms. Laverty had been contradicted.

Respondent also asserts that, in referring to conclusions made by Todd Favorite in a report, the prosecutor improperly speculated concerning how an absent witness would have testified. First, this claim is not properly preserved because it is outside the scope of respondent's statement of the issue on appeal, which is limited to whether the prosecutor committed misconduct by commenting on the credibility and quality of witnesses. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Regardless, the report drafted by Tuschak and Favorite, Tuschak's work partner, was admitted into evidence without objection from respondent. Thus, petitioner's counsel did not act improperly by making arguments based on Favorite's conclusions in the report inasmuch as a prosecutor is allowed to make arguments based on the evidence. *McElhaney, supra* at 284.

Respondent next claims that the prosecutor improperly used the first person during closing argument. However, where a prosecutor's argument is based on the evidence and does not suggest that the jury decide a case based on the authority of the prosecutor's office, "the words 'I believe' or 'I want you to convict' are not improper. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d

905 (1988). Accordingly, none of the remarks by the prosecutor were improper merely because he used the first person.

Respondent submits that the prosecutor made an improper remark by referring to "my version" of events. In light of the prosecutor's express indication that he had the burden of trying to prove his case, this remark did not improperly call on the jury to decide the case based on the authority of the prosecutor's office. *Id.*

Further, given that no reasonable person would dispute that a father molesting his child is depraved and morally corrupt, the prosecutor's comments indicating that Rachelle had testified about being subjected to extreme depravity were reasonable argument based on the evidence. *McElhaney, supra* at 284. In pointing out that respondent would have a motive to lie about having molested Rachelle, the prosecutor permissibly argued about respondent's credibility. *People v Gilbert,* 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Respondent claims that the prosecutor's comment that "I don't think she would have seen spit on a penis on TV; I don't think she would have seen that -- those words in a book; it happened" was "clear prosecutorial misconduct." We disagree. During Tuschak's cross-examination, she read an excerpt from a tape recorded interview with Rachelle in which Rachelle said that respondent pulled his pants down and "spit on his penis." Tuschak indicated that this lent a great deal of credibility to Rachelle's statement because a child her age would not ordinarily have knowledge that one might lubricate himself with his own saliva. The prosecutor reasonably argued that this evidence enhanced Rachelle's credibility because she was unlikely to have had knowledge to fabricate this representation. The prosecutor aptly noted that such a graphic description of sexually oriented acts would rarely be broadcast on most television channels or described in books intended for children.

The prosecutor also said in closing argument that Rachelle's mother had left a message on Tuschak's answering machine, "you f--ing bitch, you tore my family apart, my husband will kill us all" and that this led him to believe that she was in fear of respondent. These comments were not entirely supported by evidence because, according to Tuschak's testimony, the mother did not say that respondent would kill them all, but rather "you're going to kill my kids and me; you're gonna have my kids and I killed." Respondent did not object to these remarks below. The prosecutor's basic point was that the mother's comments indicated that she was fearful of respondent. This was a reasonable inference inasmuch as it is unclear whom else she could have meant would have killed her and her children. Thus, we find no manifest injustice from the prosecutor's misstatement. *McElhaney, supra* at 283.

Finally, respondent attacks remarks made by the prosecutor at the end of his closing argument. These claims were not preserved below. Respondent asserts that remarks suggesting that the jurors place themselves in Rachelle's position were improper, citing *People v Buckey,* 133 Mich App 158; 348 NW2d 53 (1984), rev'd on other grounds 424 Mich 1; 378 NW2d 432 (1985).[1] In *Buckey,* this Court determined that, while the prosecutor had improperly asked the jury to place themselves in the role of the complaining witness, a curative instruction by the trial court rendered the error harmless

beyond a reasonable doubt. Accordingly, we conclude that, although the prosecutor improperly suggested that the jurors place themselves in Rachelle's position, a curative instruction could have removed any prejudicial effect. We also find no manifest injustice from these remarks. *McElhaney*, *supra* at 283. Emotional language may be used in closing argument. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). The remarks emphasized the seriousness of the allegations and the effect that sexual abuse had on Rachelle. Respondent asserts that the prosecutor made an improper civic duty argument by stating that Rachelle was "looking for help. Now, she's looking to you." The comment came at the end of the prosecutor's argument after he had discussed at length considerations in favor of believing that Rachelle had been molested by respondent. The comment does not appear to have been directed at larger social problems. We conclude that this remark was within the bounds of permissible emotional language, including argument. *Ullah*, *supra* at 679.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman

[1] Respondent failed to note that *Buckey* was reversed.